No. 14,518

IN THE

United States Court of Appeals

For the Ninth Circuit

NAT YANISH,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellee.

APPELLEE'S BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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APPELLEE'S BRIEF.

The appeal herein is from the order of the District Court of July 12, 1954 which found that respondent was on *March 9, 1953,* in "technical contempt" of a previous order, dated July 20, 1950, enjoining the imposition of conditions in a delivery bond, when he *notified* petitioner that conditions would be imposed, although acting in good faith and by written direction of his superior officer, but decreed that no sanctions be imposed, nor reparations be awarded to petitioner. (R. 45.)

JURISDICTION.

Is the order of July 12, 1954 from which the appeal herein was noted, an appealable order? Said order involves a civil contempt proceeding.

McCrone v. United States, 307 U.S. 61, 64;
Fox v. Capital Co., 299 U.S. 105.

Appellant cites 28 *U.S.C.* 1291, 1292 as conferring jurisdiction upon this Court.

Appellee challenges jurisdiction under either section on the ground that the order appealed is neither a final order under 1291, nor an interlocutory order under 1292.

Roger St. Helen v. Wyman, No. 14619 decided by this Court April 13, 1955;
McDoyle v. London Guarantee Co., 204 U.S. 599;
Taylor v. Bowles, (CA-9) 152 F. 2d 3;
In re Eskay, (CA-3) 122 F. 2d 819.

STATUTES.

8 *U.S.C.* (1946 ed.) 156, Section 20 of the Immigration Act of 1917, as amended:

> "* * * Pending the final disposal of the case of any alien so taken into custody, he may be released under a bond in the penalty of not less than $500 with security approved by the Attorney General, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he

shall be found to be unlawfully within the United States."

Effective September 23, 1950, sec. 23 of the Internal Security Act of 1950 amended sec. 20 of the 1917 Act.

(1) The above portion of 8 *U.S.C.* 156 was amended as follows:

"Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made."

(2) The following paragraph was added as 8 *U.S.C.* 156(b):

"(b) Any alien, against whom an order of deportation, heretofore or hereafter issued, has been outstanding for more than six months shall, pending eventual deportation, be subject to supervision, under regulations prescribed by the Attorney General. Such regulations shall require any alien subject to supervision (1) to appear

from time to time at specified times or intervals before an officer of the Immigration and Naturalization Service for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information whether or not related to the foregoing as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

8 *U.S.C.* 1252(a), Section 242(a) of the Immigration and Nationality Act of 1952:

"(a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the

Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. * * *"

8 *U.S.C.* 1252(c), Section 242(c) of the Immigration and Nationality Act of 1952:

"When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. * * *"

8 *U.S.C.* 1252(d), Section 242(d) of the Immigration and Nationality Act of 1952:

"(d) Any alien, against whom a final order of deportation as defined in subsection (c) of this section heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include pro-

visions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both."

8 *U.S.C.* 1101, note, Section 405(a) of the Immigration and Nationality Act of 1952:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal,

brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

QUESTION PRESENTED.

The only question cited concerns the specification of error that the Court erred in refusing to impose sanctions and award reparations.

STATEMENT OF THE CASE.

The deportation proceedings against appellant were commenced in *1946* under the Act of February 5, 1917 (39 Stat. 874). Pending the final disposition of the charge appellant was released on bond. The determination of deportability of appellant was pending in 1950 when the order of July 28, 1950, enjoining appellee from "requiring (Yanish) to revise or amend the said bail bond by requiring periodic visits from him to the Immigration Service, or in any other particular except as to the principal amount of said bond", was entered. On December 24, 1952 Public Law 414, 82nd Congress, the McCarran-Walter Act, 8 *U.S.C.* 1101 et seq., became effective.

On March 9, 1953 the determination of the deportability of appellant was still pending. The notice then given to appellant that conditions would be imposed in the bond was by written direction of appellee's superior and in accordance with Sec. 242(a) of the McCarran-Walter Act (8 *U.S.C.* 1252(a)), and section 23 of the Internal Security Act of 1950 (64 Stat. 98), which amended 8 *U.S.C.* 156 (Section 20 of the Immigration Act of 1917).

On March 11, 1953 the status of appellant changed in that on said day a final order of deportation was made against him. The Court below has found that appellant was "so notified" on March 16, 1953.

On March 17, 1953 appellant, being then subject to a final order of deportation of which he had notice, was taken into custody.

ARGUMENT.

I.

Appellant apparently has not read the order of the Court below from which the appeal has been taken. On page 4 of his brief he says:

> "This appeal is from the refusal to impose sanctions and award reparation. No appeal was taken from the finding that by imprisoning appellant he was in contempt of Judge Lemmon's order."

There has been no such finding. The only finding made was that a "technical contempt" occurred on March 9, 1954 when appellee notified petitioner that

conditions would be imposed. The *notice* to appellant was the only act committed by appellee prior to March 11, 1953 and while deportation proceedings were pending. Subsequent to March 11, 1953 the status of appellant had changed. He was then subject to a final order of deportation. The trial judge's use of the word "technical" clearly indicates that although he found that appellee had acted in good faith and by written direction of his superior, in view of this Court's holding that the applicability of Section 242 "must be considered in the light of the broad and comprehensive savings clause" (Sec. 405 of the McCarran-Walter Act (8 *U.S.C.* 1101, note)) he had concluded that a status under the 1917 Act and the order of July 28, 1950 had been saved to appellant pending final determination of deportability and that therefore there was a *technical* violation. The trial judge also expressly found that when appellant was taken into custody on March 17, 1953 his status had changed in that the order for deportation had become final.

Appellant's statement on page 1 of his brief—"and this, despite the fact that as a result of appellee's contempt, appellant was forced to spend two and one-half months illegally in jail * * *" is not supported by the Court's finding.

Appellant's statement on page 5 of his brief—"The sole question thus presented is whether under such circumstances and in the face of an undisputed record that as a result of that contempt appellant was incarcerated for two and one-half months * * *"—is not supported by the Court's finding.

We repeat that the only contempt found by the Court is in *sending* the notice on March 9 and this the Court characterized as "technical".

Appellant has not specified the *finding of the Court* as error.

II.

THE MATTER OF THE RELEASE OF APPELLANT FROM CUSTODY PENDING DEPORTATION PROCEEDINGS BECAME MOOT ON MARCH 11, 1953 WHEN THE DEPORTATION ORDER BECAME FINAL.

On March 16, 1953 appellant received notice that the deportation order had become final on March 11, 1953. On March 17, 1953 a petition for a writ of habeas corpus was filed below. The petition (p. 6 Tr. of Record, No. 13,785 this Court) alleges in paragraph V(c) "that 242(a) of the Immigration and Nationality Act, under color of which the Immigration and Naturalization Service purports to act, has no application to petitioner, in that petitioner has been released under a bond not referred to in said section, and further, that by section 405 of said Act the provisions of the Act are inapplicable to the status, rights and bond of petitioner." The petition was not entertained below. An appeal from the dismissal order was noted and on March 22, 1954 after appellant conceded the cause to be moot, this Court, in No. 13,785, entered a per curiam order dismissing the appeal as moot.

In *United States ex rel. Spinella v. Savoretti,* 201 F. 2d 364 (CA-5), cert. den. 345 U.S. 975, a petition

for writ of habeas corpus for release under bond pending deportation proceedings was denied and petitioner appealed. Before the hearing date of the appeal, appellee filed a motion to dismiss the appeal as moot on the ground that the deportation order had become final. The Fifth Circuit held per curiam "that the deportation order is now final; that the question raised by his appeal, whether the Court erred in denying their bond pending the deportation proceedings, has become moot", and dismissed the appeal.

This Court, in *Carlisle v. Landon,* 219 F. 2d 439 (CA-9), upon a similar situation likewise dismissed the appeal as moot and cited *Spinella v. Savoretti,* supra. The appeal was from a denial in a habeas corpus proceeding of liberty pending final determination of deportation proceedings before immigration authorities. The deportation proceedings were completed and petitioner-appellant was finally ordered deported. On April 15, 1955 the opinion appearing at 219 F. 2d 439, was amended by striking the last two paragraphs and inserting in lieu thereof the following:

> "We therefore hold that this appeal is moot. United States ex rel. Spinella v. Savoretti, 5 Cir., 201 F. 2d 364; certiorari denied 345 U.S. 975, 73 S. Ct. 1124, 97 L. Ed. 1930.
>
> "Appeal dismissed."

III.

Appellant contends that he is entitled as of right to an order in civil contempt imposing a compensation fine and relies upon *Parker v. United States* (CA-1), 153 F. 2d 66.

(a) The action of the trial Court is discretionary.

From *Union Tool Co. v. Wilson,* 259 U.S. 107, the following is quoted from page 112:

> "In the determination of the question whether an injunction has been violated and if so whether compensation shall be made to the injured party, there may be occasion for the exercise of judicial discretion; but the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. See *Christensen Engineering Co. v. Westinghouse Air Brake Co.,* 135 Fed. 774; *Gordon v. Turco-Halvah Co.,* 247 Fed. 487."

Cf.:

United States v. United Mine Workers, 330 U.S. 258;

Gompers v. Buck's Stove & Range Co., 221 U.S. 418.

In *Miller v. Zaharias* (CA-7), 168 F. 2d 1, 3, cert. den. 335 U.S. 823, the Seventh Circuit held:

> "As we have frequently held, the action of the trial court upon a charge of contempt is discretionary in character and is not to be reversed

except for abuse of such discretion or unless clearly erroneous."

NLRB v. Deena Artware (CA-6), 207 F. 2d 798;

Jewel Tea Co. v. Kraus (CA-7), 204 F. 2d 549.

(b) Appellee acted solely and only as an officer of the United States.

The trial Court has used the term "technical contempt" to characterize the notice of March 9 given by appellee to appellant. The appellee herein is the District Director of the Immigration and Naturalization Service in San Francisco. At all times he acted in his official capacity as an officer, agent, and employee of the United States. His performance of duty is controlled by the statutes and laws enacted by the Congress of the United States, the regulations of the department under which he served and the orders and directions of his superior.

There is a long list of authorities for the principle that a government official is immune from liability for acts authorized by law and within the scope of his duties. Mistake of fact, mistake of law, or even ulterior motive, will not make the official liable for damages for his action.

Spalding v. Vilas, 161 U.S. 483, 498;

Long v. Wood, 92 F. 2d 211, cert. den. 302 U.S. 686;

United States v. Craig, 266 Fed. 230;

Cooper v. O'Connor, 99 F. 2d 135;

Cooper v. O'Connor, 107 F. 2d 207;
Gladstone v. Galton (CA-9), 145 F. 2d 742;
Laughlin v. Rosenman, 163 F. 2d 838;
Taylor v. McGrath, 194 F. 2d 883;
Orvis v. Brickman, 196 F. 2d 752;
Taylor v. Glotfelty, 201 F. 2d 51;
Keppleman v. Upton (N.D. Cal.), 84 F. Supp. 478;
United States v. Merchants Transf. & Storage (CA-9), 144 F. 2d 324.

(c) Appellee acted in good faith within the scope of his authority by direction of his superior, and in accordance with an Act of Congress.

Appellee had been directed by his superiors to act in accordance with the provisions of the McCarran-Walter Act, the Immigration and Nationality Act of 1952. (8 *U.S.C.* 1252(a).) Said Act authorized the imposing of conditions in a delivery bond. The notice of March 9, 1953 was given in good faith in accordance with said Act and direction.

In the case of *Pennsylvania v. The Wheeling and Belmont Bridge Co.,* 59 U.S. 421, the defendants had been enjoined from building a certain bridge which would obstruct navigation on a certain river. Thereafter Congress enacted legislation which did authorize the bridge. The defendants, in reliance upon this Act of Congress as authority, proceeded with the construction of the bridge in disobedience of the injunction. Upon a motion for attachments against the persons mentioned for this disobedience and con-

tempt, the majority of the Court (p. 436) was of the opinion "that the Act of Congress afforded full authority to the defendants to reconstruct the bridge and the decree directing its alteration or abatement could not, therefore, be carried into execution after the enactment of this law, and inasmuch as the granting of an attachment for the disobedience is a question resting in the discretion of the Court, under all the circumstances of the case, the motion should be denied."

The dissenting opinion of Justice McLean, although expressing the view that the law was unconstitutional and void, still considered it an excuse for the defendants' contempt.

The following is quoted from page 449:

> "Six of my brethren now hold that the Act of Congress arrested the progress of the Court in carrying their decree into effect and gave the defendants a right to build their bridge. The injunction prohibited them from reconstructing it; can the defendants be punished for contempt for doing that which the law authorized? This view shows that the injunction ought not to have been granted, as it was against the law. And is not this a sufficient excuse for the contempt charged? *My view is, that the law was unconstitutional and void, and yet I consider it as excusing the defendants' contempt. I cannot punish defendants by fine or imprisonment for doing that which the law authorized them to do.*" (Emphasis ours.)

Mills v. Green, 159 U.S. 651, 16 S.Ct. 132.

From the *United States v. United Mine Workers,* 330 U.S. 358, the following is quoted from pages 303-4:

> "Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two parties: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. *Gompers v. Bucks Stove and Range Co.,* supra, at 448, 449. Where compensation is intended, a fine is imposed payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensation fine is dependent upon the outcome of the basic controversy."

In the case of *Newton Rubber Works v. De Las Casas,* et al., 84 Northeast Reporter 119, the Supreme Judicial Court of Massachusetts had before it a situation in which the defendant had been enjoined from maintaining a certain dam or obstructing a certain river to the injury of the plaintiff. A legislative enactment thereafter authorized such a dam and the defendant then constructed it. On the proceeding to hold defendant in contempt, the Court said:

> "This statute, enacted after the decree, gave the respondents ample authority to do all that they are alleged to have done."

The Court was of the opinion that the defendant could not be held in contempt, saying that if the effect of the statute was in doubt he could bring a bill of review to have the decree vacated, but continued

> "But this was unnecessary. For, if they acted in good faith, understanding that the effect of the new law was to give them authority which would relieve them from the restraint of the decree, and if in fact the statute gave them such authority, there would be no ground for holding them guilty of wilful disobedience in contempt of the court."

On March 16, 1953 Judge Murphy refused to issue the order to show cause on the ground that the new law, Public Law 414, the Immigration and Nationality Act of 1952, the McCarran-Walter Act (8 *U.S.C.* 1101, et seq.) was then applicable and provided authority for the action of appellee. This Court, in *Yanish v. Barber,* 211 F. 2d 467, reversed Judge Murphy's order of dismissal and remanded the cause with direction to issue the order to show cause requiring appellee to show cause why he should not be held in contempt (of Judge Lemmon's order of July 28, 1950). The order (Tr. 4) of Judge Hamlin of July 12, 1954 is the result of the hearing on the order to show cause in compliance with the mandate. This order makes no mention of any status saved to appellant by the savings clause of the 1952 Act, Sec. 405(a). The judge simply found there was a "technical contempt" of the injunction when the notice was sent on March 9, 1953, but that when appellant was taken into custody on March 17, 1953 his status had changed in that on March 11, 1953 he had become subject to a final order of deportation.

IV.

APPELLANT HAS SUFFERED NO DAMAGE.

On the contrary, he has successfully avoided deportation from March 11, 1953 to date. No proceeding has been commenced to review the legality of the deportation order. Appellant's status has changed from 8 *U.S.C.* 1252(c) to 8 *U.S.C.* 1252(d) in that more than six months has elapsed since the deportation order became final.

CONCLUSION.

It is respectfully submitted that the Court below did not err in ordering no sanction imposed on appellee nor reparation awarded to appellant.

Dated, San Francisco, California,
June 17, 1955.

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